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**Comptroller General  
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**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** Contrack International, Inc.

**File:** B-401871.5, B-401871.6, B-401871.7

**Date:** May 24, 2010

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Kevin P. Connelly, Esq., Joshua C. Drewitz, Esq., and Amanda B. Weiner, Esq., Seyfarth Shaw LLP, for the protester.

Sam Z. Gdanski, Esq., Gdanski & Gdanski, LLP, for Zafer Contracting Construction and Trade Company, Inc., the intervenor.

Jeremy Becker-Welts, Esq., and Patrick D. Bowman, Esq., Department of the Army, Corps of Engineers, for the agency.

Linda C. Glass, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that the agency's evaluation of the awardee's past performance was unreasonable is sustained where the agency did not consider relevant adverse information, of which the agency was aware, for the awardee.

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### DECISION

Contrack International, Inc., of McLean, Virginia, protests the award of a contract to Zafer Contracting Construction and Trade Company, Inc., of Ankara, Turkey, under request for proposals (RFP) No. W917PM-09-R-0075, issued by the Department of the Army, Corps of Engineers, for the design and construction of an ammunition supply point at Bagram Airfield, Afghanistan. The protester challenges the agency's evaluation of proposals and source selection decision.

We sustain the protest.

### BACKGROUND

The RFP, issued on May 25, 2009, provided for the evaluation of proposals on a "best value" basis under the following factors, listed in descending order of importance: experience, past performance, project management plan and price. Offerors were informed that the non-price evaluation factors combined were equal to price. RFP at 22-24.

With respect to the experience factor, the RFP provided that the agency would evaluate the relevant experience of offerors and their proposed team for projects that were the same or similar to the contract work. The RFP also required offerors to submit a minimum of 5, but not more than 10 projects, using “Experience Information” forms provided by the RFP. Id. at 23. All projects were to have been underway or completed within the last 3 years, and at least 3 projects were required to have values in excess of \$15 million.

With respect to the past performance factor, offerors were informed that the agency would evaluate past performance with respect to the projects identified under the experience factor. In this regard, offerors were instructed to provide letters of recommendation, performance evaluations, letters of appreciation, commendations, and awards or certificates of appreciation. Id. at 20, 23. The RFP provided that the agency would evaluate “past performance information to assess the level of performance risk associated with the offeror’s likelihood of success in performing the requirements.” Id. at 23. Additionally, the RFP provided that information pertaining to recent relevant contracts could be evaluated, as well as information obtained from other sources not identified by the offeror. Id.

Instructions for the preparation of proposals required offerors to submit their proposals on 8 ½ by 11 inch paper (unless specifically authorized elsewhere in the RFP), and directed offerors not to use unusual font styles, such as script, or a font size smaller than a 10-point font. See id. at 17. The RFP also set page limitations for each evaluation factor. For example, project management plans were limited to 6 pages, not including organizational charts. Id. at 20.

Proposals were received from 15 firms, including Contrack and Zafer, which were evaluated by the agency’s source selection evaluation board (SSEB). Contrack’s and Zafer’s proposals were evaluated as follows:

	<b>Contrack</b>	<b>Zafer</b>
Experience	Excellent	Good
Past Performance	Marginal	Excellent
Project Management Plan	Satisfactory	Good
<b>Overall Rating</b>	<b>Satisfactory</b>	<b>Good</b>
<b>Risk Rating</b>	Marginal	Low
<b>Price</b>	<b>\$42,852,719</b>	<b>\$42,752,382</b>

Zafer’s higher-rated, lower-priced proposal was found to reflect the best value to the government, and award was made to Zafer. Following a debriefing, Contrack protested to our Office, challenging the agency’s evaluation of its and Zafer’s proposals and the selection decision. Among other things, Contrack challenged the evaluation of its and Zafer’s past performance. With respect to Zafer’s evaluation, Contrack complained that the Corps failed to consider adverse performance

information regarding Zafer's construction projects for the Corps in Afghanistan. Specifically, Contrack noted--and provided to the agency--negative information concerning Zafer's past performance contained in a number of Contractor Performance Assessment Reports (CPARs),<sup>1</sup> a Department of Defense (DoD) Inspector General (IG) report, and a Bloomberg News article.<sup>2</sup> Following the submission of a supplemental protest, the Corps decided to take corrective action by amending the RFP to allow competitive range offerors, including Zafer and Contrack, to submit revised proposals. We dismissed Contrack's initial protest as academic on November 4, 2009.

The competitive range offerors were informed that they could submit revised proposals to address the weaknesses identified in their debriefing letters. Because Zafer was the awardee and did not receive a debriefing, Zafer was informed separately of its evaluated strengths and weaknesses. Contracting Officer's (CO) Statement at 1. With respect to Zafer's past performance, which received an excellent rating, Zafer was informed that the Corps had also assessed a weakness against the proposal for construction delays arising out of the need to provide security for supply convoys. Agency Report (AR), Tab 16, Corps Letter to Zafer, Nov. 22, 2009, at 2.

After revised proposals were received, a new SSEB was convened to evaluate the proposals. Contrack's revised proposal was rated satisfactory under the past performance factor (as compared to the marginal rating its initial proposal had received); Zafer's revised proposal received the same excellent evaluation rating under past performance as its initial proposal. AR, Tab 8, SSEB Report, Dec. 14, 2009, at 2.

The CO, who was also the source selection authority (SSA) for this procurement, rejected the SSEB's evaluation of revised proposals, after concluding that the SSEB report "contained inadequate narrative detail to support the board's findings and was not sufficient for me to use as a basis for a source selection decision." CO's Statement at 1. The CO appointed another SSEB, "with no prior knowledge of the procurement," and instructed the board to evaluate the offerors' revised proposals using the same evaluation factors and criteria contained in the original solicitation. The review by this SSEB was limited to considering whether any ratings previously assigned should be increased as a result of the offerors addressing their evaluated deficiencies and weaknesses. CO's Statement at 1.

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<sup>1</sup> The CPAR system is used by DoD to collect contractor past performance information.

<sup>2</sup> The DoD IG's report and Bloomberg News article were provided as attachments to Contrack's initial protest.

Contrack's and Zafer's revised proposals were evaluated as follows:

	<b>Contrack</b>	<b>Zafer</b>
Experience	Excellent	Excellent
Past Performance	Satisfactory	Excellent
Project Management Plan	Excellent	Excellent
<b>Overall Rating</b>	<b>Good</b>	<b>Excellent</b>
<b>Risk Rating</b>	Low	Low
<b>Price</b>	<b>[DELETED]</b>	<b>\$42,752,383</b>

AR, Tab 10, SSEB Report, Jan. 26, 2010, at 3.

With respect to Contrack's revised proposal, the SSEB assigned a satisfactory rating under the past performance factor, based upon additional customer evaluations and recommendations, and upon information received from Construction Contractor Appraisal Support System (CCASS) ratings.<sup>3</sup> The SSEB determined, however, that Contrack was not entitled to a higher past performance rating because Contrack provided only a single evaluation or letter of commendation addressing two of its ten past performance projects. *Id.* at 2. The SSEB also increased Contrack's rating under the project management plan factor to excellent, based upon Contrack's revised project management plan, which the board favorably cited for quality control processes, safety and security. *Id.*

With respect to Zafer's revised proposal, the SSEB increased Zafer's rating under the experience factor to excellent because Zafer provided additional projects, showing recent experience in design and construction of similar dollar value and complexity. The SSEB made no change to Zafer's past performance rating because "the previous SSEB had already given this factor the maximum possible rating." *Id.* The board also increased Zafer's rating under the project management plan factor to excellent, based upon a revised plan that the board found provided an excellent discussion of Zafer's knowledge and understanding of community relations as it applied to construction projects in Afghanistan. *Id.*

Based upon the revised SSEB evaluation report, the SSA determined that Zafer's higher-rated, and now higher-priced, proposal still reflected the best value to the government. Specifically, the SSA concluded that, although Contrack had submitted a lower price than Zafer, the evaluated technical superiority in Zafer's proposal was worth the additional price, because "successfully performing work in Afghanistan is extremely challenging and the ability to achieve such success in an outstanding manner is extremely valuable to the government." AR, Tab 11, Source Selection

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<sup>3</sup> CCASS is the module within the CPAR system used to collect performance information on construction contracts.

Decision, at 6-7. In this regard, the SSA noted that Zafer's higher past performance rating was based upon the company's many outstanding letters of commendation, and upon CCASS ratings for projects in Afghanistan, where many of the firm's projects were completed ahead of schedule. In contrast, the SSA noted that Contrack's CCASS ratings were only satisfactory and that Contrack had submitted only a single evaluation letter for two projects, and nothing for its remaining projects. Id. at 6.

Award was again made to Zafer, and this protest followed.

## DISCUSSION

### Past Performance Evaluation

Contrack argues that the agency's assessment of Zafer's past performance as excellent was unreasonable because the Corps failed to consider adverse past performance information concerning Zafer's past performance. Specifically, the protester complains that the agency did not consider negative CPARs for three of Zafer's projects, one of which was a contract with the Corps for the renovation and repair of the National Army Military Hospital in Kabul, Afghanistan. This contract was the subject of the DoD IG report that Contrack provided to the Corps with its initial protest.

Contrack also complains that the agency ignored the news article (which was provided with the initial protest) that reported that the DoD IG would be investigating other deficiencies found by the Commission on Wartime Contracting in Iraq and Afghanistan with respect to Zafer's performance of another Corps contract for construction services related to a headquarters building in Kabul.<sup>4</sup> Protest at 11. Contrack contends that the agency, in its review of the CPARs, unreasonably assigned Zafer's proposal an excellent rating based upon the company's performance of two smaller projects, while ignoring negative reports for the three larger projects.<sup>5</sup> Comments at 7.

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<sup>4</sup> This news report stated that the commission had found that another contractor was "hired to correct much of the allegedly poor work." Protest (B-401871), attach. 5, Tony Capaccio, "Pentagon Inspector General Probes Afghan Headquarters Contract," Bloomberg.com (July 6, 2009).

<sup>5</sup> The protester also argues that Zafer should not have received an excellent past performance rating because one of the weaknesses in Zafer's proposal assessed by the initial SSEB (under the experience factor) was that Zafer did not identify any experience on projects larger than \$29 million. The agency states, however, that this previously assessed weakness was not considered in the revised evaluation because the RFP only required offerors to identify three projects valued in excess of \$15 million.

The Corps responds that Zafer's excellent past performance rating was based upon the "totality of the past performance information," which the Corps argues was "laudatory." See CO's Statement at 2. In this regard, the SSA states that one of the projects upon which the Corps based its overall past performance rating was for an ammunition supply point, which the Corps states was more directly relevant than Zafer's other construction projects. Finally, the Corps argues that it had no obligation to consider the adverse information about Zafer's prior performance contained in the DoD IG report, any materials developed by the Wartime Contracting Commission, or the news report concerning Zafer's past performance. In the agency's view, the Corps acted reasonably in ignoring these "external materials," even though the agency acknowledges that these materials were provided to it by Contrack as part of the earlier protest filings. AR at 5-6.

As a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. However, we will question an agency's evaluation conclusions where they are unreasonable or undocumented. Clean Harbors Envtl. Servs., Inc., B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222 at 3; OSI Collection Servs., Inc., B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18 at 6. The critical question is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror's past performance, including relevant information close at hand or known by the contracting personnel awarding the contract. OSI Collection Servs., Inc., supra, at 6. As explained below, we find that the agency's past performance evaluation did not meet this standard.

The record shows that Zafer's excellent past performance rating was primarily based upon two outstanding CCASS performance ratings for projects in Afghanistan, which the SSA found to be similar to the current requirement. See Original CO's Statement, Oct. 2, 2009, at 2. The original SSEB noted as strengths in Zafer's proposal that Zafer had provided many outstanding letters of commendation, that there were minimal field changes and requests for equitable adjustments, that Zafer had outstanding ratings on projects in Afghanistan, that Zafer had a good safety record, and that many of Zafer's projects were completed ahead of schedule. See AR (B-401871), Tab 8, Original SSEB Report, at 18-19.

As noted by Contrack during its initial protest, Zafer's initial proposal identified nine projects for its experience and, in accordance with the RFP requirements, provided past performance forms for all nine projects. See Protest at 11. The Corps obtained CPARs for five of Zafer's identified projects (all of which were performed in Afghanistan), which the Corps provided with its report on Contrack's initial protest. Three of these reports, however, provided overall ratings of satisfactory or marginal, and indicated that Zafer had a number of performance problems on these projects. For example with respect to the CPAR for Zafer's National Army Military Hospital

project in Kabul (overall value of \$18.9 million), the report indicated that Zafer's performance rating was marginal overall; the report also contained such remarks as "[d]eficient work was not corrected in a timely [manner]," "multiple notices of deficiency were issued with no resolution," and "[p]erformance was consistently poor without correction." This was the project that was the subject of the DoD IG report that Contrack provided to the Corps with its initial protest. See Protester's Comments, exh. 5, CPAR for Contract No. W917PM-05-C-0005. Similarly, the CPAR for another of Zafer's reported projects, the design and build of a hospital facility at Baghram Airfield, indicated that Zafer's performance received an overall satisfactory rating, but noted that some of its work (including the quality of its work) was assessed as marginal.

Although the Corps generally argues that it based its assessment of Zafer's past performance as excellent upon the "totality" of Zafer's record, there is no evidence in the contemporaneous evaluation record of the agency's consideration of these three CPARs, which were identified by the protester. Moreover, the Corps has not shown in response to the protest how it could reasonably conclude that Zafer's overall past performance was excellent in light of the three CPARs indicating only satisfactory or marginal performance on a number of construction projects in Afghanistan. In this regard, we recognize that the Corps may not have been aware, at the time of its initial evaluation and selection decision, of the DoD IG report and other information that may indicate negative past performance by Zafer, but the Corps was provided with this information during the earlier protest. Nonetheless, there is no indication in the record that the Corps made any effort to investigate the merits of these reports, at least one of which appears to be documented in one of the CPARs available to the agency. In fact, it appears from the record that the newly-appointed SSEB only reviewed Zafer's revised proposal under the past performance factor to see if the firm addressed the single weakness identified during discussions. See AR, Tab 10, SSEB Report, Jan. 26, 2010, at 3; see also Tab 10, SSEB Consensus Evaluation Worksheet for Zafer, Past Performance Factor ("no increase in rating – already Excellent").

In the absence of evidence in the record that the Corps considered relevant information available to it concerning Zafer's past performance, we have no basis to find reasonable the agency's assessment of an excellent rating for Zafer under the past performance factor. We sustain Contrack's protest on this basis. See GTS Duratek, Inc., B-280511.2, B-280511.3, Oct. 19, 1998, 98-2 CPD ¶ 130 at 14 (protest sustained where agency ignored known past performance information).

The protester also complains that the agency in its past performance evaluation did not account for the fact that Zafer's revised proposal made a number of changes in the projects it identified for review under the experience factor. Specifically, Contrack notes that Zafer eliminated two of the nine projects originally identified, and added three new projects. On this basis the agency increased Zafer's rating under the experience factor from good to excellent. Contrack contends that,

contrary to the solicitation instructions, Zafer did not provide any past performance information for these three new projects, and that the Corps did not assess Zafer's past performance with respect to these projects.

The Corps responds that there is no requirement that it obtain past performance information for each project identified by an offeror in response to the experience factor and that, in any event, Zafer had already been assessed as excellent under the past performance factor before Zafer revised its proposal.<sup>6</sup> See Supplemental AR at 6-7. We disagree. We read the RFP here to require past performance information for each of the projects identified under the experience factor. See RFP at 20. In this regard, the RFP clearly indicated that the agency would consider the firms' past performance on the projects for which the firms were receiving credit under the experience factor. The Corps should consider obtaining and evaluating past performance information for these new projects.

#### Project Management Plan Evaluation

Contrack also challenges the agency's evaluation of Zafer's proposal under the project management plan factor. Specifically, Contrack states that proposals were limited to six pages for this evaluation factor and that offerors were directed not to use a font size smaller than 10-point. See RFP at 17, 20. Contrack argues that Zafer's revised proposal uses a smaller font than allowed, and violates the RFP's page limitations by including numerous appendices.<sup>7</sup> Contrack notes that Zafer's original proposal received a rating of good under this factor, despite being 20 pages in length, rather than six pages in length as required by the solicitation.

The record does not support Contrack's challenge in this area. First, although the RFP directed that offerors use a font size not smaller 10-point font, the solicitation did not require the use of any particular font. The Corps has shown that there are a number of commercially-available 10-point fonts that allow Zafer's proposal information to be contained in fewer than six pages. See Supplemental AR at 3-4.

Also, with respect to Zafer's use of appendices in the project management plan portion of its proposal, the Corps states that none of its evaluators reviewed the appendices. In this regard, the Corps notes that Zafer referenced these same appendices in its original, 20-page proposal response to this factor. In addition, our review of the evaluators' worksheets and consensus report show that all of the

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<sup>6</sup> The CO states that, although the SSEB was free to discover additional weaknesses or deficiencies, they were "not tasked with matching up the submitted Past Performance projects with the Experience projects." Supplemental CO's Statement.

<sup>7</sup> Contrack contends that it appears that Zafer used Tahoma 8.5-point font for its revised proposal.

narrative comments supporting Zafer's excellent rating under this factor involve matters that are contained within the first six pages of the portion of Zafer's proposal that addresses this plan.<sup>8</sup> None of Contrack's contentions in this area demonstrate that the company was in any way prejudiced.

We sustain the protest.<sup>9</sup>

We recommend that the agency reevaluate the awardee's past performance, giving due consideration to all relevant information and conducting discussions if appropriate,<sup>10</sup> and make a new selection decision. If another offeror's proposal is found to offer the best value to the government, the Army should terminate Zafer's contract for the convenience of the government and make award to that other offeror. We also recommend that Contrack be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2010). Contrack should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Lynn H. Gibson  
Acting General Counsel

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<sup>8</sup> It appears that Zafer eliminated unnecessary language, charts and spacing in its revised plan.

<sup>9</sup> Contrack also challenges the agency's assessment of weaknesses and deficiencies in its own proposal under the past performance factor, and argues that the agency did not conduct meaningful discussions with the firm. Because the agency addressed these issues in its report, and the protester did rebut or otherwise address the agency's response, we find that the protester abandoned these arguments. CM Mfg., Inc., B-293370, Mar. 2, 2004, 2004 CPD ¶ 69 at 3.

<sup>10</sup> For example, the discussions letter provided to Zafer did not identify any concerns arising from external information (such as the DoD IG Report) that might cause the agency to downgrade Zafer's past performance evaluation. We also see nothing in the record to show that Zafer was given the opportunity to respond to this adverse information.